OCA 87-3834
2 September 1987

NOTE FOR: ADGC/L&ICA
ADGC/AL&MS
C/ALD/OGC
C/ICAD/OGC

FROM: [redacted] Legislation Division STAT
Office of Congressional Affairs

SUBJECT: Justice Views Letter on Exempting Security Determinations from Judicial Review

1. Attached is a copy of a letter dated 20 May 1987 from the Department of Justice to the Office of Management and Budget which mysteriously showed up here only a few days ago.

2. The letter states Justice's support for the concept of exempting security determinations from judicial review but opposes inclusion of a statutory provision to that effect in the Fiscal Year 1988 Intelligence Authorization Bill because of the pendency of the Egan case.

3. As you know, that provision was ultimately dropped from the bill (which, by the way, is now in conference). I thought that you might be interested in Justice's views, though, should there be consideration of including this item in the draft '89 bill. STAT

[redacted]

Attachment:
as stated

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

20 MAY 1987

The Honorable James C. Miller, III
Director, Office of Management and Budget
Washington, D.C. 20503

Re: Section 404 of the draft Intelligence Authorization Bill for FY 1988

Dear Dr. Miller:

The Department of Justice strongly supports the concept of exempting from judicial review all determinations by agency heads regarding access to classified information. However, because we have a petition for a writ of certiorari on this issue currently pending, we recommend against submitting Section 404 of the draft Intelligence Authorization Bill for FY 1988 at this time.

The CIA's draft proposal appropriately seeks to exempt from review all determinations regarding access to classified information made by the heads of executive branch agencies as defined in 5 U.S.C. 552(e). The exemption would thus apply to all access determinations, for both government employees and others. Further, we believe that the attempt to provide a complete exemption from review on any basis, including constitutional questions, by any court or administrative agency, is constitutional. See the government's petition for a writ of certiorari in Gates v. Doe, No. 86-1294, pp. 22-25.

However, we recommend against proposing legislation on this issue at the present time, because we are currently seeking Supreme Court review on the same issue in No. 86-1552, Department of the Navy v. Egan. The question in Egan is one of statutory interpretation. If Congress were to consider and reject an explicit statutory exemption from review while Egan is pending, it would seriously undercut our argument. If certiorari is not granted in Egan,[1] or if the Supreme Court rejects our position, we would then enthusiastically support the CIA's attempt to obtain an explicit legislative exemption from review.

[1] We expect to learn on May 26 whether the Supreme Court will hear Egan.

There appears to be a problem with the section as drafted, however. By providing that "the agency head's certification, and any action taken by the agency head pursuant thereto, shall be final and conclusive . . ." the section could be read to seek to exempt from review personnel actions taken as a result of the access determination, rather than simply exempting the access determinations from review. To exempt from review personnel actions taken as a result of a change in an employee's access to classified information would be a major change in civil service law. As it does not appear from the section by section analysis and explanation that the proposed section 404 is seeking such a sweeping change in federal personnel law, but instead is seeking to immunize from review only those actions directly related to access determinations, such as revocation of security clearance, the language should be revised to so reflect. Accordingly, we would suggest that the language be revised to read "the agency head's certification, and any action taken by the agency head pursuant thereto to deny, revoke, or limit access to such classified information, shall be final and conclusive . . ."

In sum, although the Department of Justice supports the concept embodied in Section 404, we recommend against proposing legislation on the subject until after the Supreme Court has taken final action in Department of the Navy v. Egan.

Sincerely yours,

John R. Bolton

JOHN R. BOLTON
Assistant Attorney General